

SINGAPORE REPORTS

Pac Asian Services Pte Ltd v European Asian Bank AG

COURT OF APPEAL (SINGAPORE) - CIVIL APPEAL NO 27
OF 1986
12 JANUARY 1987
WEE CHONG JIN CJ, SINNATHURAY AND RAJAH JJ

Companies and Corporations - Winding up - Provisional liquidators, appointment of - Grounds to justify appointment - Necessity for full and frank disclosure - Whether possible to rectify failure to make such disclosure by later evidence - Whether new order could be made appointing provisional liquidator - Inquiry into damages for improper appointment - Companies Act (Cap 185, 1970 Ed), ss 254(1)(e), (2)(a) & 267

The respondent petitioned to have the appellant wound up on the ground of the appellant's inability to pay its debts. The respondent also applied ex parte for the appointment of a provisional liquidator. There was the usual undertaking as to damages. The ex parte order was granted and the appellant appealed to a judge, who dismissed the appeal and confirmed the order. The petition was based upon a statutory demand for payment served not at the company's registered office but at some other address. The respondent sought leave to amend the petition, which was granted by the judge. The appellant appealed to the Court of Appeal. The appellant alleged that the petition was incurably defective in that (a) the statutory demand had not been served at its registered office and, accordingly, the presumption in s 254(2)(a) of the Companies Act (Cap 185, 1970 Ed) did not arise; (b) without the benefit of the presumption in s 254(2)(a), there was nothing in the petition to support the allegation that the appellant was unable to pay its debts; and (c) the petition had not been served on the appellant before the ex parte application for appointment of provisional liquidators. The appellant asked that the provisional liquidators be discharged and that damages be awarded for the wrongful appointment thereof. The appellant also contended that the respondent should not have been given leave to amend their petition.

Held, allowing the appellant's appeal in part and ordering that the provisional liquidators be discharged:

(1) Rule 25 of the Companies (Winding-Up) Rules 1969 required service of the petition on the appellant before the hearing of the petition, not before the hearing of the ex parte application for the appointment of provisional liquidators.

(2) If a petitioning creditor wishes to rely upon the 'deeming' provision in s 254(2)(a) of the Companies Act, strict compliance with the conditions set out therein is necessary. This was because the presumption that a company was unable to pay its debts did not appear to be rebuttable. As the statutory demand was not served at the appellant's registered address, service was irregular and defective and the defect could not be cured by either s 392 of the Act or r 191 of the Rules.

(3) Every petition for the winding up of a company must set out the facts on which the petitioner relies to support his propositions. The statutory demand was ineffective in that no demand had been pleaded in the petition.

(4) However, an application to amend the petition was permissible under s 257(2)(e). The High Court gave leave to amend although no supporting affidavit had been filed. This was

A unobjectionable as the need to amend was plain to all parties. The Court of Appeal saw no need to interfere with the judge's discretion, but the court was not deciding if the petition was or was not in order now.

(5) Before the court will appoint a provisional liquidator, the petitioning creditor must show that there is a good prima facie case for winding up and must also adduce evidence to show that it is right in the circumstances of the case that provisional liquidators be appointed.

(6) When an ex parte application for a Mareva injunction is made, the applicant should make full and frank disclosure of all material facts; this principle applies to an ex parte application to appoint provisional liquidators.

(7) On the facts, the affidavit in support of the application to appoint provisional liquidators was inaccurate and contained material non-disclosure.

(8) However, further evidence may be introduced during inter partes proceedings even if the evidence was available at the time of the ex parte application but was not presented to the judge then. In the appropriate case, the judge hearing the inter partes appeal from the ex parte application could find that further evidence had rectified the earlier deficiency and refuse to discharge the ex parte order.

(9) But in this case the affidavit was so hopelessly inaccurate and misleading that the only logical order was to discharge the provisional liquidators.

(10) A new order appointing provisional liquidators could not have been made because, based on the provisional liquidators' report, there was no evidence that there was a real danger that the company's assets might be dissipated to the detriment of all the creditors before the hearing of the petition.

(11) It was not premature to order an inquiry as to damages; such an inquiry could be ordered even before the trial of the matter if it is established that the ex parte order should not have been made in the first place, as was the case here.

[Editorial Note: The respondent's appeal to the Judicial Committee of the Privy Council was withdrawn by leave of the Lords of the Committee with no order as to costs on 5 July 1989.]

G Cases referred to

- 1 *Re Mannum Haulage Pte Ltd* (1974) SASR 451 (folld)
- 2 *Re Alpina Pte Ltd* (1977) 2 ACLR 331 (folld)
- 3 *Re Willes Trading Pte Ltd* (1978) 3 ACLR 583 (refd)
- 4 *Re Media Press Pty Ltd* (1980) 4 ACLR 867 (refd)
- 5 *Re Capital Annuities Ltd* [1979] 1 WLR 170 (refd)
- 6 *Re Highfield Commodities Ltd* [1985] 1 WLR 149 (folld)
- 7 *Re Saldowa Pty Ltd* (1986) 4 ACLC 200 (refd)
- 8 *Omarjee v Lincoln Hunt Australia Pty Ltd* (1986) 4 ACLC 205 (refd)
- 9 *Bank Mellat v Nikpour* [1982] Com LR 158 (refd)
- 10 *The 'Niedersachsen'* [1983] 2 Lloyd's Rep 600 (refd)
- 11 *Amalgamated Investment & Property Co v Texas Bank* [1982] QB 84 (refd)
- 12 *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors* [1985] 2 MLJ 236 (folld)
- 13 *Ushers Brewery Ltd v King & Co* [1972] Ch 148 (folld)
- 14 *Ari Trend Ltd v Blue Dolphin (Pte) Ltd* [1983] 2 MLJ 93 (refd)

Legislation referred to

Companies Act (Cap 185, 1970 Ed) ss 254(1)(e), (2)(a), 257(2)(e), 267, 392
Companies (Winding-Up) Rules 1969 rr 22, 25, 191.

Leolin Price QC and Manjit Singh (Juliet Toh (Mrs) with them) for the appellant.

Christopher Bathurst QC and Wong Meng Meng for the respondent.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): On 23 January 1986, the respondent, European Asian Bank Aktiengesellschaft ('the bank'), presented a winding-up petition against the appellant, Pac Asian Services Pte Ltd ('the company'). The petition was to be heard on 2 May 1986. On 24 January 1986, the bank made an ex parte application under s 267 of the Companies Act (Cap 185, 1970 Ed) for an order appointing provisional liquidators which was heard and granted by Chua J. The orders also contained the usual undertaking as to damages.

On 18 February 1986, the company filed an application for an order:

- (a) that the order made herein on 23 January 1986 for the appointment of provisional liquidators of Pac Asian Services Pte Ltd be discharged;
- (b) that there be an inquiry as to damages and the petitioner do pay Pac Asian Services Pte Ltd damages so assessed;
- (c) that the petition herein be dismissed; and
- (d) that the costs of this petition, including the costs of and incidental to this application, be taxed and paid by the petitioner to Pac Asian Services Pte Ltd.

The date in prayer (a) should have read 24 January 1986, and not 23 January 1986. The bank then took out an application for leave to amend the petition.

Both applications were heard by Lai Kew Chai J on 7 and 8 April 1986. The learned judge, in a succinct judgment, dismissed the company's application with costs and granted the bank leave to amend the petition. This appeal by the company is in respect of Lai Kew Chai J's orders. The hearing of the petition (since amended) has been adjourned pending the outcome of this appeal.

We heard the arguments on 8, 9 and 10 October 1986 and on 16 October 1986 we made the following orders:

- 1 The appeal against the decision of Lai Kew Chai J affirming Chua J's order of 24 January 1986 is allowed. Accordingly, the order of 24 January 1986 of Chua J appointing provisional liquidators is hereby discharged.
- 2 There will be an inquiry as to damages and the bank is to pay the company damages to be assessed, such inquiry and assessment to be conducted by the registrar.
- 3 The order made by Lai Kew Chai J granting leave to amend the petition is affirmed and accordingly the appeal against this part of Lai Kew Chai J's order is dismissed.
- 4 The order of Lai Kew Chai J that the costs of the application to amend be the company's costs in any event is to stand.
- 5 The bank, the respondent, is to pay the company two-thirds of the company's taxed costs here and below.

6 The deposit paid as security for costs of the appeal to be paid out to the company (appellants) or its solicitors.

We now give our reasons. The arguments advanced by counsel on behalf of the appellant were:

- (1) the petition as presented on 23 January 1986 was defective and incurably so; it could not therefore support the interlocutory appointment of provisional liquidators;
- (2) the affidavit in support of the ex parte application for the order appointing provisional liquidators did not comply with the standard of candour and accuracy required in such an application;
- (3) the ex parte application must be seen in the light of the evidence and the petition before the court on 24 January 1986 and justification could not be sought ex post facto, especially from the provisional liquidators' report which was said to be suspect;
- (4) the amendment of the petition should have been refused, with liberty to the bank to commence a fresh petition. In any event, the amendment could not validate retrospectively the improper appointment of the provisional liquidators.

We will now deal with these arguments.

(1) *Was the petition presented on 23 January 1986 defective?*

The material contents of the winding-up petition as it stood on presentation on 23 January 1986 read:

The humble petition of European Asian Bank Aktiengesellschaft, a banking company incorporated with limited liability in the Federal Republic of Germany and having a place of business in Singapore at 50 Raffles Place, Shell Tower, Singapore 0104.

1 Pac Asian Services Pte Ltd (hereinafter called 'the company') was on 14 September 1972 incorporated under the Companies Act (Cap 185, 1970 Ed).

2 The registered office of the company is at 10 Anson Road, #17-15, International Plaza, Singapore 0207.

3 The nominal capital of the company is \$1,000,000 divided into 1,000,000 shares of \$1 each. The amount of the capital paid up or credited as paid up is \$1,000,000.

4 The objects for which the company was established are as follows:

- (a) To carry on the business of transportation in all its branches including business as carriers of passengers, livestock and other animals and goods; as shipping, chartering, forwarding and transport agents, as stevedores, wharfingers, carmen, carting contractors and agents, cargo superintendents, packers and hauliers, as warehousemen and proprietors of warehouses and as coach and other vehicle proprietors, garage proprietors engineers and electricians.

- (b) To carry on the business of travel agents, tourist agents and contractors, cable and telegraph companies' agents, bankers, banking, insurance, forwarding and general agents, aircraft and ship owners and charterers, agents for operators of air, sea, land or inland waterway carriage undertakings, road transport owners and hirers, hotel, apartment and lodging-house keepers, caterers and store-keepers, and generally to facilitate travelling, and to provide for tourists and travellers or promote the provision of facilities of every description, and in particular by means of the booking of travel tickets and accommodation and hotel and lodging accommodation, providing guides, safe deposits, inquiry bureaux and baggage transport, and arranging the operating tours.
- (c) ... To act as freight, passenger and ticket agent and broker for steamship and railroad companies, and other carriers of passengers or goods; and other objects set forth in the memorandum of association thereof.

5 The company is indebted to your petitioners in the sum of \$3,240,124.03 claimed by them as being the amount due and owing from the said company to the petitioners.

6 On 21 December 1985 your petitioners, through their solicitors, served on the company by hand at their office a letter of demand requiring the company to pay the said sum of \$3,056,626.95 which demand was in the following terms:

'Take Notice that we, Messrs Shook Lin & Bok of No 2 Battery Road, #06-00, Malayan Bank Chambers, Singapore 0104, solicitors for the European Asian Bank hereby require you to pay to our clients the sum of \$3,056,626.95 being the amount due and owing from you to our clients together with interest thereon.

And Take Further Notice that in the event of your failure and/or refusal to make payment of the aforesaid sum to our clients or to us within three (3) weeks from the date of receipt of this demand, we shall, on behalf of our clients, petition for you to be wound up by the court under the ground, provided for in s 254(1)(e) read with s 254(2)(a) of the Companies Act (Cap 185, 1970 Ed), namely, that you are unable to pay your debts.

Please note that this notice is only for purpose of s 254(2)(a) of the Companies Act and shall not in any way affect our clients' letter of demand dated 9 December 1985 and any proceedings taken pursuant to that letter including any petition for winding up.'

7 More than three weeks have now lapsed since your petitioners served the said demand but the said company has not made payment of the sum and has neglected to make any satisfactory offer to your petitioners to secure or compound the same. Your petitioners have received a sum of \$180,000 which represents the amount realized by the company from the sale of certain assets charged to your petitioners by the company to secure its indebtedness.

8 Further, since the date of the said demand, the company's indebtedness to your petitioners has increased by a further sum of \$318,402 being the amount paid by the petitioners under a banker's guarantee given by the petitioners to one Sabena Belgian World Airlines, at the company's request, guaranteeing to Sabena Belgian World Airlines repayment by the company to them of the sum due to them by the company.

9 The company is deemed to be insolvent and unable to pay its debts. Alternatively, the company is insolvent and unable to pay its debts.

A 10 In the circumstances, it is just and equitable that the company be wound up.

Your petitioners therefore humbly pray as follows:

- (a) That Pac Asian Services Pte Ltd may be wound up by the court under the provisions of the Companies Act (Cap 185).
- B (b) That Mr Jefferey Heng, Mr Wong Yew Meng and Mr Roger Edmonds be appointed as the liquidators of the company.
- (c) That the petitioners' costs in the proceedings herein be taxed and paid by the company.
- (d) Such other order as this honourable court may deem necessary.

C The appellant submitted that:

- (1) the petition was wholly defective in so far as it depended on the statutory demand of 21 December 1985, as that demand had not been served at the registered office of the company;
- (2) the petition was defective without the benefit of the deeming provision, as the respondent was alleging that the company was unable to pay its debts without supporting assertions of fact to substantiate the allegation;
- (3) the petition was doubly bad as it was not served on the company as at 24 January 1986. For this proposition, they rely on r 25 of the Companies (Winding-Up) Rules 1969.

We will dispose of the third point first. The appellant's argument on this point is untenable as r 25 must mean service before the hearing of the petition and not service before the hearing of an ex parte application.

F The bank's petition was substantially founded on s 254(1)(e) read with s 254(2)(a) of the Companies Act. Section 254(1) reads:

The Court may order the winding up if ...

- (e) the company is unable to pay its debts;
- G Section 254(2) is in the following terms:

A company shall be deemed to be unable to pay its debts if

- (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding \$500 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- H (b) ... or
- I (c) it is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

Paragraph 2 of the petition stated that the registered office of the company was at Anson Road. The appellant, in an

affidavit of Lai Nai Yain (a director of the company) filed on 18 February 1986, averred that that was true only for the period 3 November 1985 to 22 December 1985, after which the registered office was changed to that at North Bridge Road. It appeared from the 'statutory demand' dated 21 December 1985 (exhibited in the affidavit of Christopher John Weir, the senior assistant manager of the bank, filed on 23 January 1986) that it was served at an address in Tuas, Jurong. That was never the registered office of the company. A legal assistant with the firm of solicitors acting for the bank has, in her affidavit filed on 6 March 1986, acknowledged that the statutory demand was served at a place other than the registered office of the company. She explained that 'due to inadvertence and the urgency of the matters, I have misread the results of the search on the company from the Registry of Companies and Businesses'.

The law is that if a petitioning creditor wishes to rely upon the 'deeming' provision in s 254(2)(a) of the Act, strict compliance with the conditions set out therein is necessary. Illustrations of the need for strict compliance with the statutory conditions can be found in *In Re Mannum Haulage Pte Ltd*,¹ *Re Alpina Pte Ltd*,² and *Re Willes Trading Pte Ltd*.³ There is a cogent reason for requiring exact compliance. The presumption that the company is unable to pay its debts does not appear to be a rebuttable one. The presumption immediately renders the company liable to be wound up by the High Court under s 254(1)(e). Because of the serious consequence that results, we are also of the view that where the petition is founded on the 'deeming' provision in s 254(2)(a), and service of the statutory demand is irregular or defective, such irregularity or defect is not within the contemplation of s 392 of the Act or of r 191 of the Rules.

The bank's petition, therefore, is incurably defective in so far as it rested on the statutory demand of 21 December 1985 and the presumption in s 254(2)(a).

It may be briefly mentioned here that para 10 of the petition and the affidavit of Christopher John Weir filed on 6 March 1986 appeared to place reliance on the 'just and equitable' ground contained in s 254(1)(i) as well, but since both parties did not address us on this issue, we need say no more about it.

The next argument concerns the alternative assertion in para 9 of the petition that the company was insolvent and unable to pay its debts. The company's objection to this was that, without the benefit of the deeming provision, the bank was asserting indebtedness without pleading facts in support of the assertion. It was a bare allegation.

Counsel for the company referred us to the case of *Re Media Press Pty Ltd*⁴ in support of his proposition that a petition must set out the material facts on which the

A petitioner relies and such particulars as are sufficient to clarify the precise nature of his case. But we need look no further than the Rules for this proposition. Rule 22 of the Companies (Winding-Up) Rules 1969 provides that every petition for the winding up of a company by the court shall be in the Form 2 or 3 set out in the First Schedule to the Rules. Both forms require the petitioner to set out in paragraphs the facts on which the petitioner relies to support his proposition.

C Following from this proposition, in order to prove that a company was 'unable to pay its debts', there should have been a demand (*Re Capital Annuities Ltd*⁵ at pp 187 and 188). If the purported statutory demand of 21 December 1985 was struck out, there was no demand pleaded in the petition.

D Counsel for the bank conceded that the demand of 21 December 1985 was bad in law as a statutory demand and they could not therefore avail themselves of the 'short-cut' method of establishing the company's inability to pay its debts pursuant to s 254(2)(a).

E But it was submitted that they were not thereby precluded from relying on other evidence to prove that the company was unable to pay its debts. It was said that there were two demands which had not been complied with: (1) the demand of 21 December 1985; and (2) the first demand of 9 December 1985.

F It is plain from the last paragraph of the demand of 21 December 1985 that it was issued 'only for purpose of s 254(2)(a) of the Companies Act'. The only allusion to the demand of 9 December 1985 in the petition was in the same closing paragraph of the demand of 21 December 1985; it was not independently pleaded. The words 'the said demand' in the other paragraphs of the petition must refer to the purported statutory demand.

G Be that as it may, we are not at the stage of the hearing of the petition. This issue of lack of assertions of fact to substantiate the allegation made by the bank must be examined with the application for leave to amend the petition.

H The bank has sought to put the petition in order by inserting the present registered office address, by stating the fact that the demand of 21 December 1985 was served at Tuas, Jurong, and by adding four more paragraphs of pleadings of facts.

I That such application to amend is permissible under s 257(2)(e) cannot be disputed. Lai Kew Chai J granted the bank leave to amend the petition with costs to be paid to the company in any event, although no supporting affidavit had been filed. This fact is not, however, objectionable as the need to amend must be plain to all parties then, in view of the company's application and the many affidavits filed therein. We saw no reason for interfering

with the learned judge's exercise of discretion on this issue. In so deciding, we make no pronouncement on whether the petition as amended has been put in order. What is clear is that on 24 January 1986, there was before Chua J a petition which has been shown to be defective.

We would also mention that we are unable to agree with counsel for the company that the proper, orthodox position in such a case was to dismiss the petition. The court in such an application does not sit to punish a party for its mistakes. We emphasize that we are not now hearing the petition.

(2) *Was there full and frank disclosure by the bank in its affidavit in support of the ex parte application?*

We must first consider the principles governing an application under s 267. The appointment of provisional liquidators puts the company's affairs under their control. The resulting effect is to practically paralyze the operations of the company. Such an appointment appears the more draconian when it is made on an ex parte application. The company has been delivered a punch before it even steps into the ring.

We agree with Sir Robert Megarry V-C in *Re Highfield Commodities Ltd*⁶ at p 158, that the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding-up order will be made. But that is only the threshold which the applicant must cross. It must still be asked whether it is right in the circumstances of the case that provisional liquidators be appointed.

In *Re Saldowa Pty Ltd*,⁷ the company appealed against a decision of a master that a provisional liquidator be appointed. Fullagar J was of the opinion that there was a very wide discretion in the court to appoint a provisional liquidator. The learned judge dismissed the appeal but not before finding (at p 201, last paragraph):

that the petitioner, Galaxy International Pty Ltd, has good grounds for winding up the company, that it is likely that a winding-up order will be made on its petition and the application is brought mainly because of serious and, on the circumstances as they appear before me, and on the particular evidence before me, justified fears that if a provisional liquidator is not appointed and kept in office, assets are likely to be dissipated.

Similarly, in *Omarjee v Lincoln Hunt Australia Pty Ltd*,⁸ although the headnotes indicate that 'in the light of a prima facie case of insolvency having been made out the court's discretion would be exercised in favour of appointing a provisional liquidator', it is plain from p 214 of the report that that was only a threshold question. The court had this to say:

I am satisfied that a prima facie case of insolvency has been made out.

The final aspect on the matter of relief is the exercise of discretion. I have taken the following into consideration.

A The court then went on to consider five matters. These included the assertion that money was being siphoned off and the fact that the company made no attempt to deny this assertion; the fact that there were no audited balance sheets and that the company refused to give information; and the consideration that some urgent action in relation to the preservation of assets was needed but none taken.

B We are therefore of the view that, in the circumstances of our case, the bank must first show a good prima facie case of insolvency on the company's part, and then adduce other evidence to justify the appointment of provisional liquidators.

C There is one further point before we proceed to examine the affidavit of Christopher John Weir filed on 23 January 1986 ('the first Weir affidavit'). Where an ex parte application is made for a Mareva injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts (*Bank Mellat v Nikpour*⁹). In *The 'Niedersachsen'*¹⁰ at p 611, Mustill J had this to say:

Plaintiffs who seek Mareva relief will do well to bear in mind that the same obligations of candour apply to these proceedings, as to any other form of ex parte application.

We can find no objection in principle why the same obligation should not be imposed on the bank in its ex parte application for appointment of provisional liquidators. Bearing all these principles in mind, was the first Weir affidavit one capable of supporting the ex parte application? The affidavit stated that the statutory demand of 21 December 1985 was served on the company by hand at its registered office. It also annexed a copy of the petition filed on 23 January 1986. These were obviously done to establish a prima facie case of the company's insolvency. But, as we have already seen, the demand was admittedly never served at the registered office, and the petition, in so far as it was founded on s 254(1)(e) read with s 254(2)(a), was defective. The alternative assertion, relying on s 254(2)(c), was similarly defective in that it was a bare allegation. Although the amended petition may have rectified this defect, it remains that there was a defective petition before Chua J on 24 January 1986.

H The company also contended that there were misrepresentations and non-disclosure of material facts in the first Weir affidavit. The affidavit mentioned the following:

6 On or about 1 January 1979 the company entered into a general sales agency agreement with one Sabena Belgian World Airlines (hereinafter referred to as 'Sabena'), whereby the company was appointed the sole agent for Sabena for the sale of their airline tickets.

I 7 For the purpose of obtaining this sole agency the company requested the bank to give and the bank gave a banker's guarantee in favour of Sabena for due performance and payment by the company to Sabena according to the terms of the said general sales agency agreement. Annexed herewith and exhibited as CJW-3 is a copy of the banker's guarantee.

8 As the company has defaulted in making payments under the general sales agency agreement, Sabena has demanded of the bank payment under the said banker's guarantee.

9 I have been informed by one Mr Guy Robbe of Sabena and I verily believe that Sabena has terminated their sole agency and given the same to one Pac Asian Aviation Services Pte Ltd (hereinafter referred to as 'Pac Asian Aviation').

10 Although I was told by Mr Guy Robbe of Sabena that Mr Lai Nai Yain, a director of the company, has transferred his shares in Pac Asian Aviation to another person, a search made by the bank's solicitors at the Registry of Companies and Businesses shows that Mr Lai Nai Yain still owns 40% of the shares in Pac Asian Aviation.

11 On or about 9 September 1985, a meeting was held between Mr Bernd Ulrich Timm, who is the manager of the bank and Mr Lai Nai Yain, representing the company. It was agreed at the meeting that the company shall commission an independent accountant to investigate into the accounts of the company and make available the results of these investigations to the bank, as the company has not been able to make payment of the amounts due by them to the bank since July 1985.

12 As a result of this meeting, Mr Jamshid Medora of JK Medora & Co was commissioned to investigate into the accounts of the company and to submit to the bank a report of the company's financial position. Annexed hereto and exhibited as CJW-4 is a copy of a letter from the company to JK Medora & Co. The report shows that on an adjusted basis the company's net liabilities exceeds its assets although based on the book value of the assets of the company, the company is solvent.

13 The report also shows that the company had substantial assets in the form of trade debts. I verily believe that much of these trade debts are due from various travel agencies in payment of airline tickets sold by the company to them pursuant to the said general sales agency agreement. However, I have been told by Mr Lai Nai Yain on several occasions that as from 1 December 1985, all the account receivables of the company have been transferred to Pac Asian Aviation. I am unable to tell whether Pac Asian Aviation has given any consideration for this assignment.

14 Further, the company's other main assets are the barges, tugs and boats. I have caused enquiries to be made with the Port of Singapore Authorities and have discovered that all except two of the vessels are not in Singapore.

15 By reason of the aforesaid, I verily believe that there is a real danger that the assets of the company may be dissipated to the detriment of all creditors of the company before the company is actually wound up and a liquidator appointed.

16 Further, the bank has instructed its solicitors to commence action against the three directors as guarantors of the debt due and owing to the bank by the company.

17 In the circumstances, it is in my submission necessary in the interest of all creditors of the company that provisional liquidators be appointed immediately to protect the assets of the company pending the obtaining of a final order for the winding up of the company and the appointment of a liquidator of the company.

The company's objections to the affidavit may be summarized as follows:

A (a) The Sabena matter

The affidavit created the impression that the company had transferred the Sabena general sales agency agreement ('GSA') to Pac Asian Aviation for no benefit to the company and that Lai Nai Yain was the owner of 40% of the shares in Pac Asian Aviation.

B

It was explained by the company that it was indebted to Sabena for about \$1.2m. By a tripartite agreement between Sabena, the company and Pac Asian Aviation, it was agreed that Sabena would terminate the GSA and appoint Pac Asian Aviation as its general sales agent from the same date upon terms that Pac Asian Aviation would assume full responsibility for all the liabilities of the company to Sabena in respect of the company's GSA. The effect was therefore to free the company from a \$1.2m debt, a fact made known to the bank, at the latest, by a letter dated 30 December 1985 from Lai Nai Yain. Further, Lai transferred his shares in Pac Asian Aviation on or about 3 May 1985, well before the GSA was transferred to Pac Asian Aviation.

C

(b) The Medora report

This was not exhibited in the first Weir affidavit. The report concluded that the company was probably still viable and recommended certain cost-reduction measures. The company had complied with those recommendations. The bank was aware of the steps taken by the company.

E

(c) The company's vessels

The location of the vessels of the company was made known to the bank by a telex on 20 December 1985. Lai Nai Yain in his affidavit on 12 March 1986 explained that one vessel was inadvertently omitted in the telex. The fact that all but two of the vessels were not in Singapore was unexceptional because of the nature of the company's business. They were on charter and gainfully employed in earning income for the company.

G

In addition, the company produced its bank statements to show that there had been frequent and substantial payments into the bank account since July 1985, contrary to what was said in the first Weir affidavit. The company also took exception to the fact that there had been no reply to their letter of 30 December 1985, which set out for the bank the general financial position of the company as at the end of 1985 and which made specific proposals for gradual reduction of the company's overdraft account, until the onset of these proceedings. It was argued, though not strenuously, that the bank was thereby estopped from proceeding without at least providing the company with notice that the measures indicated in that letter were not acceptable. Reliance was placed on a passage by Lord Denning MR in *Amalgamated Property Co v Texas Bank*¹¹ at p 122. We think there can be no such estoppel in these circumstances.

H

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The bank's retort was that though the tripartite agreement stated that Pac Asian Aviation was to assume and take over, as from 15 December 1985, all the liabilities incurred by the company by virtue of the GSA with Sabena, the bank was nevertheless informed by Sabena on 23 December 1985 that the company had failed to honour its financial obligation under the GSA and that Sabena was therefore exercising its rights under the bank guarantee referred to in the first Weir affidavit. But it now appears that the bank ought not to have made the payment of the sum of US\$150,000 to Sabena. That is, however, another matter.

The bank's solicitors made a search on 23 December 1985 at the Registry of Companies' Instant Information Service. That search showed Lai Nai Yain owned 40% of the shares in Pac Asian Aviation. But it has been explained that such a search would only have disclosed the shareholdings as at the date of its last annual return, which would have been 24 September 1984. If the bank's solicitors had made a search in the Register of Members maintained pursuant to s 190 of the Companies Act, the true state of affairs would have been shown.

As for the Medora Report, counsel for the bank admitted before us that he was perplexed to discover that it had not been exhibited in the first Weir affidavit.

In relation to the vessels, the bank alleged that some of them had been mortgaged to an affiliated company, as security for debts which were at best dubious. The company referred us to the Medora report which indicated that there was money owing to the affiliated company. There was a further allegation that five barges had been transferred to a company known as Triune Maritime Pte Ltd, and that this was another instance of dissipation of the company's assets. Lai Nai Yain explained in his affidavit filed on 14 March 1986 that the company owned only 50% of each vessel and that, in December 1985, the five vessels were transferred to Triune Maritime Pte Ltd as nominal owners for the purpose of realizing cash for the company. This was done to secure better prices for the vessels in view of the market perception that the company was anxious to dispose of its vessels to realize cash.

This sequence of thrust and parry highlights one salient point - the first Weir affidavit was a far from satisfactory one in the light of the legal principles that we have discussed. It could not, in view of its inaccuracies and non-disclosures, form the basis for the appointment of provisional liquidators. We now come to the third argument of the company.

(3) *The ex parte application must be seen in the light of the evidence and the petition before the court on 24 January 1986, and justification could not be sought ex post facto*

We have already said that the order granting leave to amend the petition should stand. We have also indicated

A that the amendment did not detract from the position that there was before Chua J a defective petition. Now that we find the first Weir affidavit wanting, it is clear that, if Chua J had been apprised of the true state of affairs on 24 January 1986, he would in our opinion almost certainly not have acceded to the ex parte application.

B When the application to discharge Chua J's order came before Lai Kew Chai J on 7 and 8 April 1986, there was very much more material in evidence. If the evidence at the later stage would justify the making of the order, could that rectify the deficiency in the first Weir affidavit? Could Lai Kew Chai J say, 'Even though the order could not have been made on the material then before Chua J, it could now be made on the evidence before me. I would continue the earlier order.'? Alternatively, could Lai Kew Chai J order that the earlier order be discharged and substitute a new one in its place?

D We would respectfully adopt the reasoning of Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd v Lorrain Osman*¹² pp 240 to 241, in concluding that further evidence may be introduced during the inter partes proceedings even if the evidence was available at the time of the ex parte application but not presented to the judge then. We are aware that the learned judge's pronouncement on this point may be obiter since the further evidence in that case was not available at the time of the ex parte applications, but the strength of his reasoning is not thereby diminished.

F Counsel for the appellants cited *Bank Mellat v Nikpour*⁹ for the proposition that if a Mareva injunction were improperly obtained, the court would not grant a new Mareva injunction in its place even though the plaintiffs had subsequently rectified matters, because the plaintiffs should be deprived of any advantage which they had obtained by the previous, wrongly obtained, injunction. The plaintiffs there had argued that the non-disclosure was innocent and suggested that, although initially there may not have been full and frank disclosure, that could be rectified later. On this, Lord Denning MR said:

H There may sometimes be a slip or mistake - in the application for a Mareva injunction - which can be rectified later. It is not for every omission that the injunction will be automatically discharged. A locus penitentiae may sometimes be afforded; but not in this particular case.

Therefore in appropriate cases, the court may well find that further evidence has rectified the earlier deficiency, and refuse to discharge the order obtained ex parte.

I But in a case such as we have before us, it was not a mere 'slip' or 'omission'. The first Weir affidavit was hopelessly inaccurate and misleading in material aspects. The only logical order must be to discharge the order of 24 January 1986.

Could and should a new order appointing provisional liquidators be made in its place? Even with all the evi-

dence before us, we are not able to say that there was a real danger that the company's assets may be dissipated to the detriment of all the creditors of the company before the hearing of the petition. The provisional liquidators' report of 13 March 1986 may help fuel the suspicions of the bank but it did not thereby establish that there was any such real danger. The explanations of Lai Nai Yin must also be considered, and they are, at the least, plausible. It is, so far as we are aware, novel that a report of the provisional liquidators was relied on to resist an application to discharge an order appointing them in the first place.

There was also an allegation that the report may be partisan. Objection was taken that the solicitors for the provisional liquidators were also acting as such for the petitioning creditor, the bank. This situation does not appear to be objectionable ipso facto. The circumstances of each case must be looked at. It is for the solicitors and the liquidators concerned to decide whether there would be a conflict of interest and whether it would not be better to engage another firm of solicitors. We understand that the provisional liquidators have already engaged another firm of solicitors some months back.

In our opinion, a new order appointing provisional liquidators could not have been made at the hearing in April 1986.

(4) *The amendment of the petition*

We have already dealt with this point under the first head. We need only reiterate that we see no reason to interfere with Lai Kew Chai J's order granting leave to amend the petition.

Damages

As we said at the outset, the order of 24 January 1986 contained the usual undertaking by the bank

... to abide by any order the court or a judge may make as to damages in case the court or a judge should hereafter be of the opinion that the above-named company shall have sustained any by reason of this order which the petitioner ought to pay ...

Counsel for the company submitted that if the order be discharged, as it has now been, an inquiry as to damages should be ordered. Counsel for the bank argued that it would be premature to order an inquiry at this stage. He relied on *Ushers Brewery Ltd v King & Co*¹³ where Plowman J held:

It is in my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance.

The second limb of that statement is sufficient to dispose of counsel's contention in the light of our findings. But

A since we have had occasion to hear the same argument previously in *Art Trend Ltd v Blue Dolphin (Pte) Ltd*,¹⁴ we should perhaps dispel any misunderstanding surrounding Plowman J's statement of principle.

B In that case, the plaintiffs issued a writ claiming injunctions. An interlocutory injunction, with the usual undertaking as to damages, was obtained. During the course of pleadings, events took a new turn. As a result, the plaintiffs had to amend their reply and defence to the counterclaim, stating therein that they no longer sought any relief other than payment of nominal damages and their costs of the action.

C The defendants then applied by way of a motion seeking dissolution of the interlocutory injunction (which was accepted by the plaintiffs) and an inquiry as to damages. They argued that since the plaintiffs had abandoned their claim to injunctions, it was unnecessary for the court to decide whether the injunction was rightly granted. It was, they said, as if there had been a trial on the merits or that the plaintiffs had discontinued the action.

E The plaintiffs, however, never conceded that what they had done before the turn of events was wrong, or that the injunction had not been rightly granted. The action was still alive for the purpose of having those matters decided because on them the question of costs depended. It was in that context that Plowman J then said what we have quoted earlier. The dissolution of the interlocutory injunction there could not be contested by the plaintiffs because of the occurrence of subsequent events, but it did not follow that the injunction had been improperly obtained.

Appeal allowed.

Solicitors: *Manjit Darshan & Partners; Shook Lin & Bok.*

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Reported by *Terence Tan Bian Chye*

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